Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	CC Docket No. 96-149

REPLY COMMENTS OF WORLDCOM, INC.

Mark D. Schneider
Marc A. Goldman
Jenner & Block
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for WORLDCOM, Inc.

Richard S. Whitt
Henry G. Hultquist
Cristin Flynn
WORLDCOM, Inc.
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006

(202) 887-2993

December 11, 2000

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149

REPLY COMMENTS OF WORLDCOM, INC.

All but one of the non-BOC commenters agree that the Commission should re-adopt its prior conclusion that interLATA information services are encompassed within the scope of section 271(a).[1/] Only Verizon, Qwest, BellSouth and SBC take the contrary view, reversing their previously stated interpretation of the statute.

The plain language, history and purpose of the Act all demonstrate that Section 271(a) prohibits BOC provision of interLATA information services until the BOCs have met the requirements of the section 271 checklist. As the non-BOC commenters explain, information services provided via interLATA telecommunications facilities are interLATA services and thus

---

1/ The lone exception is Cox Communications, Inc. which takes no position on whether information services fall within the scope of section 271. Cox argues that the Commission should reaffirm the distinction between "regulated common carrier services and the unregulated enhanced and information service offerings of non-carriers." Cox Comments at 5. This is entirely consistent with the view that section 271 prohibits the BOCs from providing interLATA information services. Indeed, the Commission took both of these positions in the Non-Accounting Safeguards Order itself.

squarely fall within the scope of this prohibition.[2/] Indeed, the Act explicitly discusses "interLATA information services" in section 272(a)(2)(C). See, e.g., Information Technology Association of America ("ITAA") Comments at 7-9; Competitive Telecommunications Association ("CompTel") Comments at 5; Level 3 Communications ("Level 3") Comments at 2; Commercial Internet Exchange Association ("CIX") Comments at 4; AT&T Comments at 13. It also includes particular information services on a list of "incidental interLATA services" in section 271(g). See ITAA Comments at 8; CompTel Comments at 5-6; AT&T Comments at 12. Thus, there can be no doubt that information services can be interLATA services. Moreover, the Act exempts the information services listed in section 271(g) from the scope of section 271. See, e.g, Level 3 Comments at 3; AT&T Comments at 12. It would not have been necessary to exempt particular information services from the scope of section 271 if the section did not cover information services in the first place.

The non-BOC commenters further agree with WorldCom that the Act's inclusion of interLATA information services within the scope of section 271 is apparent from the history of the Act. See, e.g., ITAA Comments at 3-6; Level 3 Comments at 2-3; AT&T Comments at 8-9. Prior to passage of the Act, the D.C. Circuit had interpreted the Modification of Final Judgment ("MFJ") to preclude the BOCs from providing information services that included a bundled interLATA telecommunications component. United States v. Western Elec. Co., 907 F.2d 160,

---

2/ When a BOC provides the interLATA component of this service, then it is providing an interLATA service. As WorldCom explained in its initial comments, when the end user separately chooses the provider of the interLATA telecommunications facilities over which the information will flow, then the Commission has stated that an information service provider is not providing an interLATA service. WorldCom Comments at 2 n.2, 9 n.4. See also AT&T Comments at 7.

163 (D.C. Cir. 1990). In passing the Act, Congress expressly eliminated some MFJ restrictions but did not expressly eliminate the restriction governing interLATA information services; see ITAA Comments at 7-8; to the contrary, it adopted section 271(a) barring BOC provision of interLATA services. If anything, this language more clearly applies to information services than the MFJ's ban on BOC provision of "interexchange telecommunications services." See AT&T Comments at 11.

Finally, the commenters agree with WorldCom that the policy considerations that underlie section 271 strongly support the Commission's interpretation of that section. See, e.g., ITAA Comments at 12-13; Level 3 Comments at 4-7; CIX Comments at 5-7; AT&T Comments at 19-20. Section 271 aims to bring greater competition to both the intraLATA and interLATA markets. Allowing BOCs to provide interLATA information services before they have opened their local markets would frustrate this purpose. It would allow the BOCs to leverage their monopoly control over local service into the information services market and would also significantly decrease the incentive for the BOCs to open their local markets.

Against all this, the BOCs retreat to the Report to Congress and attempt to import conclusions this Commission reached in another context into section 271(a) and use those conclusions to offer a hyper-technical interpretation of statutory definitions that renders that provision inapplicable to information services. The BOCs make little effort to argue that their interpretation is consistent with Congressional intent evident from the structure, history and purposes of the Act. See O'Connell v. Shalala, 79 F.3d 170, 176 (1st Cir. 1996) ("Instead of culling selected words from a statute's text and inspecting them in an antiseptic laboratory setting, a court engaged in the task of statutory interpretation must examine the statute as a

whole, giving due weight to design, structure and purpose as well as to aggregate language."). Indeed, each of these BOCs previously acknowledged that section 271 encompasses interLATA information services.[3/] The BOC attempt to capitalize on the Report to Congress to revisit this question is transparently self-interested.

It is also unpersuasive. Relying on the Report to Congress, the BOCs point out that information service providers do not provide telecommunications services to end users. But section 271(a) bars BOC provision of "interLATA services," not BOC provision of "telecommunications services" to end users. The Act in turn defines interLATA services as: "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(2). Thus, a service is an interLATA service if it includes an interLATA telecommunications component. The definition does not require that telecommunications be provided to end users, or even provided at all. It makes no mention of "telecommunications services." The BOCs' verbal gymnastics cannot hide the fact that because the Act defines information services as services provided "via telecommunications," 47 U.S.C. § 153(2), information services indisputably include a telecommunications component. Thus, interLATA information services are interLATA services. See, e.g., CompTel Comments at 3-5.

3/ See Non-Accounting Safeguards Order ¶¶ 52-57 (citing comments of BellSouth); AT&T Comments at 14 (citing Bell Atlantic/NYNEX Joint Comments, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149 at 9 (April 2, 1997); US West Reply Comments at 3-4 (April 16, 1997)); CompTel comments at 3, 9 (citing petition for Reconsideration by BellSouth, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149 at 11 (Feb. 20, 1997); Reply Comments of Ameritech at 32-33); CIX Comments at 5 (citing Opposition of US West Communications, Inc., Request for Extension of the Sunset Date of the Structural, Non-Discrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region Inter-LATA Information Services, CC Docket No. 96-149, Dec. 17, 1999, at 7).

As indicated above, any doubt on this score is removed by the explicit references in the Act to information services as interLATA services. The BOC commenters fail successfully to explain these references. SBC contends that when Section 272 requires BOCs to establish separate affiliates to provide "interLATA information services" as well as "interLATA telecommunications services, "it merely "fortifies the statute's clear distinction between 'telecommunications' and 'information services." SBC Comm. At 5-6. Qwest and BellSouth make similar arguments. See Qwest Comments at 5; BellSouth Comments at 8-9. But section 272 distinguishes telecommunications services from information services; it does not show that information services lack a telecommunications input. More important, the BOCs' argument fails to explain why the Act would refer to interLATA information services if there is no such thing as an information service that is also an interLATA service. Indeed, Qwest itself states that

> within the structure of section 272(a)(2), Congress used parallel formulations in subparagraphs (B) and (C): to highlight the *contrast* with "interLATA information services" in subparagraph (C), it used "interLATA telecommunications services" in subparagraph (B).

Qwest Comments at 7. Exactly so. While Qwest argues that "interLATA telecommunications services" was simply Congress' sloppy way of saying "interLATA services," the intentional contrast with "interLATA information services" plainly shows that Congress understood there were two separate categories of interLATA services.

Congress also referred to information services as interLATA services in section 271(g), which includes a number of information services on the list of interLATA services. In contrast to the non-BOC commenters who, like WorldCom, emphasize the importance of this reference, see supra, Verizon, Qwest and SBC simply ignore this reference in their comments. BellSouth

implies, without stating, that the list of incidental interLATA services does not include any information services. It explains that, "[t]he Commission cannot bootstrap Section 271's general interLATA prohibition to information services by 'interpreting' 'incidental interLATA services . . . as applying to both incidental telecommunications and information services." Bell South Comments at 7. But this is no mere "interpretation." One of the incidental interLATA services listed in section 271(g), for example, is "a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA." 47 U.S.C. § 271(g). This service certainly is an information service: "a capability for . . . acquiring, storing, . . . retrieving. . . or making available information via telecommunications." 47 U.S.C. § 151(20). Other services listed in section 271(g), such as specified Internet services, are also indisputably information services. See AT&T Comments at 12. Thus, like section 272, section 271 itself makes clear that information services can be interLATA services.

Section 271(g) is important for another reason as well. Section 271(b)(3) exempts the information services listed in section 271(g) from the prohibition on BOC provision of interLATA services, thus showing that other information services are encompassed by that prohibition. See, e.g., Level 3 Comments at 3; AT&T Comments at 12. Cf. George Moore Ice Cream Co., Inc. v. Rose, 289 U.S. 373, 377 (1933) (inferring that because new statutory rule expressly did not apply to court proceedings instituted prior to enactment, it must apply to all proceedings instituted after enactment). SBC is the only BOC that attempts to dispute the inexorable nature of this inference. SBC contends section 271(g) merely serves as "some extra, unnecessary assurance against any mistakenly expansive interpretation of the section 271(a)

prohibition." SBC Comments at 4. That is nonsense. If Congress believed section 271(a) did not apply to information services but thought the language arguably ambiguous, it would not have attempted to reinforce that language by explicitly exempting only some information services. Indeed, it would not have adopted an exemption at all since this strongly suggests the exempted material would otherwise fall within the scope of the statute. Rather, Congress would simply have said that section 271(a) should not be construed to apply to any information services.[4/] There is no plausible reason why Congress would have exempted specific information services from the scope of section 271 if that section did not cover information services in the first place.

The historical genesis of the Act reinforces what is evident from the statutory language – as the non-BOC commenters agree. See supra. Qwest is the only BOC that discusses any pre-Act history and it does not even mention the MFJ in doing so. Qwest explains that information services would be considered enhanced services under the Commission's past rulings and thus information service providers would not be subject to regulation as common carriers – unless they unbundled the transmission component and provided it over their own facilities. Qwest Comments at 9. But this merely emphasizes the point of the non-BOC commenters. The distinctions between information services, telecommunications, and telecommunications services

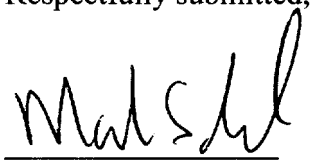
---

4/ The two cases cited by SBC do not hold to the contrary. O'Connell v. Shalala, 79 F.3d 170, 180 (1st Cir. 1996) held that statutory language was correctly construed as a grant of particular authority even though more general statutory language arguably could be construed to grant that same authority; it had nothing to do with an exemption. As for Shook v. District of Columbia Fin. Responsibility and Mgmt. Assistance Auth., 132 F.3d 775, 782-83 (D.C. Cir. 1998), that case actually held that a statutory grant of particular authority did imply the absence of any other authority but emphasized that it is important to examine context before making such an inference. Here, the very structure of the statute provides the context.

that exist in the Act – and that the Commission discussed in the Report to Congress – also existed prior to the Act. Indeed, these terms are defined in an almost identical manner in the Act as they were under the MFJ. The D.C. Circuit applied the MFJ to conclude that the BOCs could not provide interLATA information services that included a bundled telecommunications component. When Congress largely imported the MFJ terminology into the Act, it imported this conclusion as well. ITAA Comments at 5-6; AT&T Comments at 9-10.

Finally, the BOCs notably fail to discuss the purposes of section 271. They do not make any argument that the purposes of section 271 are better served by excluding information services from the scope of that section. Yet the Commission has made clear that the section's purposes are the touchstone for interpreting the term "provide" in section 271(a). And that interpretation has been affirmed by the D.C. Circuit. U.S. West v. FCC, 177 F.3d 1057 (D.C. Cir. 1999). There can be no doubt that the purposes of section 271 are served by construing information services to fall within that section.

Respectfully submitted,



Mark D. Schneider
Marc A. Goldman
Jenner & Block
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for WORLDCOM, Inc.

Richard S. Whitt
Henry G. Hultquist
Cristin Flynn
WORLDCOM, Inc.
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006

(202) 887-2993

December 11, 2000

CERTIFICATE OF SERVICE

I, Marc A. Goldman, do hereby certify that copies of the Reply Comments of WorldCom, Inc. were sent via first class mail to the following on December 11, 2000:

William E. Kennard, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Anna Gomez, Legal Advisor
Office of Chairman Kennard
Federal Communications Commission
445 12th Street, S.W., Room 8-A302
Washington, D.C. 20554

Susan Ness, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jordan Goldstein, Legal Advisor
Office of Commissioner Ness
Federal Communications Commission
445 12th Street, S.W., Room 8-A302
Washington, D.C. 20554

Harold W. Furchtgott-Roth
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Rebecca Beynon, Legal Advisor
Office of Commissioner Furchtgott-Roth
Federal Communications Commission
445 12th Street, S.W., Room 8-B115
Washington, D.C. 20554

Michael K. Powell, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Kyle D. Dixon, Legal Advisor
Office of Commissioner Powell
Federal Communications Commission
445 12th Street, S.W., Room 8-B201
Washington, D.C. 20554

Gloria Tristani, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Sarah Whitesell, Legal Advisor
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 8-C302
Washington, D.C. 20554

Dorothy Attwood, Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Carol E. Mattey, Deputy Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Johanna Mikes
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michelle Carey, Chief
Common Carrier Bureau, Policy Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Janice Myles
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room C-5163
Washington, D.C. 20554

International Transcription Service
445 12th Street, S.W., Room CY-B402
Washington, D.C. 20554

Office of Public Affairs
445 12th Street, S.W., Room CY-3014
Washington, D.C. 20554

Robert Cannon
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-3204
Washington, D.C. 20554

Marc A. Goldman